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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 242

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HEMAN H. McGUIRE, - - - - Petitioner,

*versus*

UNITED STATES OF AMERICA, - - Respondent.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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*v.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Heman H. McGuire prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above styled case on March 23, 1965.

## OPINIONS BELOW.

The District Court wrote no opinion. The opinion of the Circuit Court of Appeals has not yet been published and appears at pages 17-24 of the Appendix to this Petition.

## JURISDICTION.

The Judgment of the Circuit Court of Appeals was entered on March 23, 1965. The Order of the Circuit Court of Appeals denying the petition for a rehearing was entered May 13, 1965. An Order staying the man-

date of the Court of Appeals thirty days was entered on May 28, 1965.

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254(1).

## QUESTIONS PRESENTED.

In this case the petitioner was charged with and convicted of willful evasion of income taxes for the years 1955 and 1956. At that time Commissioner of Internal Revenue v. Wilcox (1946), 327 U. S. 404, 90 L. Ed. 752, 66 Sup. Ct. 546, holding that embezzled funds did not constitute taxable income, was in effect. Petitioner contends that the funds charged to him under the alleged circumstances were such that they constituted embezzled funds and were therefore not taxable under the rule of Wilcox. Hence, although Wilcox was later overruled by James v. United States (1961), 366 U. S. 213, 81 Sup. Ct. 1052, 6 L. Ed. 2d 246, petitioner could not have possessed any criminal intent in failing to report items which did not constitute taxable income during those years.

The Court of Appeals for the Sixth Circuit held that petitioner acquired the funds by fraud and deceit and that the instant case was to be distinguished from Wilcox because the facts were not identical, clearly mistaking the true meaning of Wilcox as to embezzled funds. The Court also erroneously distinguished the instant case from the more recent case of Adame's Estate v. C. I. R., 320 F. 2d 811 (CA 5th, 1963), in which the Court of Appeals for the Fifth Circuit held that funds received by Adame under similar circum-

stances of the petitioner did not constitute taxable income and could not be evidence of fraudulent intent. This case therefore presents the following questions:

1. Did the Court of Appeals for the Sixth Circuit erroneously decline to follow the rule announced by this Court in the cases of Wilcox and James?

2. Is there a conflict between the holdings of the Court of Appeals for the Fifth Circuit in Adame, and the holding of the Court of Appeals for the Sixth Circuit in the case at bar, and is not the holding of the Court of Appeals for the Fifth Circuit the correct one?

3. Did the Court of Appeals for the Sixth Circuit err in holding that petitioner had no right to any instruction regarding embezzled funds and to place reliance on the Wilcox rule?

4. Was the lower court's interpretation of the Kentucky statutes and cases of the Court of Appeals of Kentucky on the question of embezzlement correct and did the Court err in its refusing to apply the rules of Wilcox and James to the alleged facts of this case?

## STATUTES INVOLVED.

Section 7201, Title 26, U.S.C.;

Kentucky Revised Statutes 160.370, 160.390, 434.020 and 434.220(1).

These statutes are printed and set forth in the Appendix to this Petition at pages 24-27.